

This Opinion is not a
Precedent of the TTAB

Mailed: May 3, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

—
Trademark Trial and Appeal Board
—

In re Sweetwater Brewing Company, LLC
—

Serial No. 87772674
—

Stephen M. Schaezel of Meunier Carlin & Curfman LLC,
for Sweetwater Brewing Company, LLC.

Robert J. Struck, Trademark Examining Attorney, Law Office 109,
Michael Kazazian, Managing Attorney.

—
Before Wellington, Kuczma and Lebow,
Administrative Trademark Judges.

Opinion by Kuczma, Administrative Trademark Judge:

Sweetwater Brewing Company, LLC (“Applicant”) seeks registration on the
Principal Register of the mark DANK TANK (in standard characters) for

Ale; Beer, in International Class 32.¹

—
¹ Application Serial No. 87772674 was filed on January 26, 2018, based on Applicant’s claim of first use anywhere and first use in commerce since at least as early as January 1, 2015, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a).

References to the application record refer to the online database of the USPTO’s Trademark Status & Document Retrieval (TSDR) system. Citations to the TSDR database are to the downloadable .pdf version of the documents. References to the briefs on appeal refer to the

The Trademark Examining Attorney refused registration of Applicant's mark for failure to comply with a disclaimer requirement, under Sections 2(e)(1) and 6(a) of the Trademark Act, 15 U.S.C. §§ 1052(e)(1) and 1056(a), for the wording "DANK" contained in the mark on the ground that it merely describes a feature, purpose and/or characteristic of Applicant's goods.

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed and is fully briefed. We affirm the refusal to register.

I. Disclaimer Requirement

The issue in this appeal is whether the term "DANK" in Applicant's mark DANK TANK is merely descriptive of Applicant's goods requiring a disclaimer under Sections 2(e)(1) and 6(a) of the Trademark Act, 15 U.S.C. §§ 1052(e)(1) and 1056(a).

An applicant may not claim exclusive rights to terms that others may need to use to describe their goods and/or services in the marketplace. *See Dena Corp. v. Belvedere Int'l, Inc.*, 950 F.2d 1555, 21 USPQ2d 1047, 1051 (Fed. Cir. 1991); *In re Aug. Storck KG*, 218 USPQ 823, 825 (TTAB 1983). Merely descriptive terms are unregistrable under § 2(e)(1) and a term must be disclaimed apart from the mark as shown if it is deemed to be merely descriptive of the subject goods or services.

Board's TTABVUE docket system on the USPTO website identifying the docket entry and page numbers.

Determining the descriptiveness of a term under § 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), is done in relation to an applicant's goods and/or services, the context in which the mark is being used, and the possible significance the mark would have to the average purchaser because of the manner of its use or intended use., not in the abstract or on the basis of guesswork. *See In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (citing *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)).

Accordingly, wording in a mark must be disclaimed pursuant to § 6 of the Trademark Act, 15 U.S.C. § 1056, if it is merely descriptive of an applicant's goods and/or services and thus is an unregistrable component of the mark. Failure to comply with a requirement for a disclaimer is a basis on which to refuse registration. *See In re La. Fish Fry Prods., Ltd.*, 797 F.3d 1332, 116 USPQ2d 1262 (Fed. Cir. 2015); *In re Slokevage*, 441 F.3d 957, 78 USPQ2d 1395, 1399 (Fed. Cir. 2006); *In re Omaha Nat'l Corp.*, 819 F.2d 1117, 2 USPQ2d 1859 (Fed. Cir. 1987).

A. Is "DANK" Merely Descriptive of Applicant's Goods?

A mark is merely descriptive if it immediately conveys knowledge of a quality, characteristic, function, feature, purpose or use of the goods with which it is used. *In re Chamber of Commerce*, 102 USPQ2d at 1219 (quoting *In re Bayer*, 82 USPQ2d at 1831); *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987); *see also In re TriVita, Inc.*, 783 F.3d 872, 114 USPQ2d 1574, 1575 (Fed. Cir. 2015); *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1755

(Fed. Cir. 2012) (quoting *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978)).

The determination of whether a mark is merely descriptive must be made in relation to the goods for which registration is sought, not in the abstract or on the basis of guesswork. *In re Chamber of Commerce*, 102 USPQ2d at 1219; *In re Bayer*, 82 USPQ2d at 1831; *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1513 (TTAB 2016) (citing *In re Abcor*, 200 USPQ at 218). This requires consideration of the context in which the mark is used or intended to be used in connection with those goods, and the possible significance that the mark would have to the average purchaser of the goods in the marketplace. *In re Chamber of Commerce*, 102 USPQ2d at 1219; *In re Bayer*, 82 USPQ2d at 1831; *In re Omaha Nat'l Corp.*, 819 F.2d 1117, 2 USPQ2d 1859 (Fed. Cir. 1987). In other words, the question is not whether someone presented only with the mark could guess the goods listed in the identification. Rather, the question is whether someone who knows what the goods are will understand the mark to convey information about them. *DuoProSS v. Inviro*, 103 USPQ2d at 1757 (quoting *In re Tower Tech, Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002)). See also *In re Patent & Trademark Servs. Inc.*, 49 USPQ2d 1537, 1539 (TTAB 1998).

Evidence that a term is merely descriptive to the relevant purchasing public may be obtained from any competent source such as dictionaries, trade journals, newspapers, newspapers or surveys, as well as “labels, packages, or in advertising material directed to the goods.” *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1374 (Fed. Cir. 2018); *In re Bayer*, 82 USPQ2d at 1831;

In re Nett Designs Inc., 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001). It may also be obtained from websites and publications, and an applicant's own specimen of use and any explanatory text included therein. *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1710 (Fed. Cir. 2017).

We are mindful that a mark comprising more than one element must be considered as a whole and should not be dissected. However, in determining the descriptiveness of a term or mark comprising more than one element, it is permissible to consider the significance of each element separately in the course of evaluating the term or mark as a whole. *See DuoProSS v. Inviro*, 103 USPQ2d at 1758; *In re Hotels.com, L.P.*, 573 F.3d 1300, 91 USPQ2d 1532, 1535, 1537 (Fed. Cir. 2009) (holding HOTELS.COM generic for information and reservation services featuring temporary lodging noting that the Board did not commit error in considering "the word 'hotels' for genericness separate from the '.com' suffix"); *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370, 1372 (Fed. Cir. 2004) (holding PATENTS.COM merely descriptive of computer software for managing and tracking the status of database records noting that "the PTO may [separately] consider the meaning of 'patents' and the meaning of '.com' with respect to the goods identified in the application."); *In re Save Venice N.Y., Inc.*, 259 F.3d 1346, 59 USPQ2d 1778, 1782 (Fed. Cir. 2001) (holding a mark primarily geographically deceptively misdescriptive for a variety of goods noting that "[i]t is not erroneous, however, for the examiner to consider the significance of each element within the composite mark in the course of evaluating the mark as a whole.").

Citing the Detroit Free Press newspaper and Urban Dictionary, the Examining Attorney argues that “[w]hen used in connection with beer, the term DANK means or refers to ‘...sticky, juicy, very pungent and of a high level’ and ‘[v]ery hoppy, cloudy IPAs with high alcohol content and flavors with a very funky taste.’”²

The Examining Attorney cites to additional evidence in the record consisting of copies of articles and advertising from third-party websites showing the use of “dank” (highlight added) to describe ales and beers³:

- The Beer Connoisseur

DANK IPA

pFriem Family Brewers

“**Dank**” is a popular but hard-to-define adjective used to describe hops but we’ve done our best to define it in pFriem **Dank** IPA. This light copper ale shines with flavors of tropical fruit, hints of blueberry and a fresh hoppy finish. You might not be able to describe the **dankness** to your friends but you’ll understand it after one sip.

<https://beerconnoisseur.com/beer/pfriem-family-brewers/dank-ipa>⁴

- The Full Pint Craft Beer News

The 10 **Dankest** Beers by Dan’s Blog April 20, 2010:

Hoppy 420 Everyone. It is a national holiday for those who enjoy smoking bud. Some people like bud, some people like

² Examining Attorney’s Brief 11 TTABVUE 6 citing to the April 20, 2018, Detroit Free Press, February 24, 2020 Final Office Action at TSDR 25-26; and the Urban Dictionary <https://www.urbandictionary.com/define.php?term=Dank>, September 17, 2020 Denial of Request for Reconsideration at TSDR 40.

³ Examining Attorney’s Brief at 11 TTABVUE 6-7 citing to evidence submitted with the February 24, 2020 Final Office Action and September 17, 2020 Denial of Request for Reconsideration.

⁴ February 24, 2020 Final Office Action at TSDR 5-6.

beer, and some people like both. Those who are a connoisseur of both have taken to attributing the term ‘**Dank**,’ a term that means pungent, funky and odoriferous, to both good weed and very hoppy IPAs/IIPAs. I would like to provide you with a guide to the 10 **dankest** beers, according to my nose. While I won’t cop to being a week connoisseur, I will say that some of these beers have been labeled **dank** by other comrades who distance themselves from weed, but can still identify a **dank** IPA with the ganj. Here they are listed . . .

<https://thefullpoint.com/dans-blog/the-10-dankest-beers/>⁵

- The Washington Post, April 20, 2018

Craft breweries roll out their **dankest** beers for 4/20

. . . you see, cannabis and hops are relatives, and both get their flavors and aromas from compounds called terpenes. That’s why brewers like to describe super-hoppy IPAs the way that they might talk about marijuana: “**dank**,” “resinous,” “sticky.” . . .

https://www.washingtonpost.com/news/voraciously/wp/2018/04/20/craft-breweries-roll-out-the-dankest-beers-for-420⁶

- GOOSE ISLAND BEER COMPANY

DANK DETECTOR India Pale Ale

Dank Detector is a hop forward ale with notes of red fruit and tropical aromas with a big helping of “**dank**” to balance it out. The beer also has a light malty body and a soft bitterness and is exclusively available only in the IPA Variety Pack.

<https://www.gooseisland.com/beers/limited-release-beers/dank-detector.html>⁷

⁵ February 24, 2020 Final Office Action at TSDR 19.

⁶ February 24, 2020 Final Office Action at TSDR 10-12.

⁷ February 24, 2020 Final Office Action at TSDR 39-42.

- “**Dank**” is the new umami (the Quartz Daily Obsession)

. . . Very hoppy, cloudy IPAs are **dank**, which seems to be both a reference to their generally high alcohol content and their funky, green resinous flavors . . . when you taste a **dank** IPA, you know it.

<https://qz.com/quartz/1221995/dank-is-the-new-umami/>⁸

- BrewPublic.com describes a newly released craft beer called Our Dankest Hour:

Hunting for the deepest heart of **dankness**, the brewers at Pelican have explored new depths of adventurous flavor and emerged triumphant with the assertive resinous, earthy pungency known as **Dank**. A bold blast of hop character with notes of pine tree, blackberry and stone fruit sets the stage, while malt undertones of biscuit and subtle caramel round out the flavor balance. A candied citrus impression leads to a clean hoppy finish. . . .

<https://brewpublic.com/beer-releases/pelican-brewing-releases-our-dankest-hour-dank-ipa/>⁹

- Oct.co further describes **dank** beers:

These Beers Smell Like Weed

. . . And it turns out that hops and weed are, in fact, related – they both belong to the family Cannabaceae – so those shared **dank** notes might not come as much of a surprise. . . .

<https://oct.co/essays/modern-times-critical-band-review/>¹⁰

and

. . . “The Waldos and Lagunitas have struck a balance between **dank**, herbal hops and just enough malty

⁸ September 17, 2020 Denial of the Request for Reconsideration at TSDR 8. The first paragraph of the article begins by promoting “dank” to be on “our short list” for next year’s update in dictionary definitions at TSDR 5.

⁹ September 17, 2020 Denial of the Request for Reconsideration at TSDR 13.

¹⁰ September 17, 2020 Denial of the Request for Reconsideration at TSDR 18.

sweetness. In doing so, they have turned an interesting story into a delicious beer.”

<https://oct.co/essays/modern-times-critical-band-review>¹¹

- PeaksandPints.com states:

Friday October 13TH, 2017

Some people like bud, some people like beer, and some people like both. Those who are a connoisseur of both have taken to attributing the term ‘**dank**,’ a term that means pungent, funky and odoriferous, to both good weed and very hoppy IPAs. **Dank** means an extremely overpowering odor that can smell like the citrus and pine flavors everyone loves. **Dank** beers are ones that can easily fill a room with its odor, just like dank marijuana. . . .

<https://www.peaksandpints.com/craft-beer-crosscut-10-13-17-flight-dank-hops/>.¹²

This evidence shows the term “dank” (and derivations thereof) being used by multiple third-parties involved in promoting and reviewing products in the ale and beer industry, on their websites and in online articles directed to potential customers, to descriptively refer to the taste of certain ales and beers. Applicant also acknowledges “that the term ‘dank’ has been used with beer.”¹³ Based on the evidence submitted, and Applicant’s acknowledgement, the Examining Attorney argues that the term “DANK” is merely descriptive of ales and beers as it immediately indicates that Applicant’s goods have a fruity/juicy or funky flavor and a strong pungent, earthy aroma.¹⁴

¹¹ September 17, 2020 Denial of the Request for Reconsideration at TSDR 19.

¹² September 17, 2020 Denial of the Request for Reconsideration at TSDR 29.

¹³ See September 20, 2018 Applicant’s Response to Office Action at TSDR 3.

¹⁴ Examining Attorney’s Brief at 11 TTABVUE 8.

Applicant contends that “[n]either the term ‘dank’ nor the unitary mark ‘DANK TANK’ conveys an immediate idea of the characteristics of Applicant’s goods, but rather requires imagination to determine what the goods actually will be, namely – such wording cannot be deemed merely descriptive and is, at most, suggestive of a beer or ale product that does not include cannabis.”¹⁵ According to Applicant, “that customers must apply multiple mental steps, first associating the term ‘tank’ with a beverage and then associating the unitary mark ‘DANK TANK’ with a particular beverage (beer, ale) that does not include cannabis, demonstrates the suggestiveness of the mark.”¹⁶

A mark is suggestive if it “requires imagination, thought, and perception to arrive at the qualities or characteristics of the goods.” *In re Gyulay*, 3 USPQ2d at 1009. “[I]f one must exercise mature thought or follow a multi-stage reasoning process in order to determine what product or service characteristics the term indicates, the term is suggestive rather than merely descriptive.” *In re Phoseon Tech., Inc.*, 103 USPQ2d 1822, 1823 (TTAB 2012) (citing *In re Tennis in the Round, Inc.*, 199 USPQ 496, 498 (TTAB 1978)); *In re BetaBatt, Inc.*, 89 USPQ2d 1152, 1154 (TTAB 2008); *In re Shutts*, 217 USPQ 363, 364-365 (TTAB 1983). Similarly, descriptiveness is considered in

¹⁵ Applicant’s Brief p. 3 (9 TTABVUE 4).

¹⁶ Applicant’s Brief p. 3 (9 TTABVUE 4).

It is noted that “dank” is also used to describe cannabis. *See* article published in the Detroit Free Press on April 20, 2018, that begins “[a] funny, little word for high-quality strains of marijuana and hoppy beer is becoming more popular. ‘Dank.’”, February 24, 2020 Final Office Action at TSDR 25-26; Urban Dictionary <https://www.urbandictionary.com/define.php?term=Dank>, September 17, 2020 Denial of Request for Reconsideration at TSDR 39-40.

relation to the relevant goods and/or services, which in this case are ales and beers. *DuoProSS v. Inviro*, 103 USPQ2d at 1757.

“That a term may have other meanings in different contexts is not controlling” on the question of descriptiveness. *Robinson v. Hot Grabba Leaf, LLC*, 2019 USPQ2d 149089, at *5 (TTAB 2019) (citing *In re Canine Caviar Pet Foods, Inc.*, 126 USPQ2d 1590, 1598 (TTAB 2018)). “It is well settled that so long as any one of the meanings of a term is descriptive, the term may be considered to be merely descriptive.” *In re Mueller Sports Med., Inc.*, 126 USPQ2d 1584, 1590 (TTAB 2018) (quoting *In re Chopper Indus.*, 222 USPQ 258, 259 (TTAB 1984)); *In re Franklin Cnty. Historical Soc’y*, 104 USPQ2d 1085, 1087 (TTAB 2012). Therefore, as correctly noted by the Examining Attorney, other meanings of “DANK” are not relevant.¹⁷

Although there is no evidence that the definition of the term “DANK” appears in any traditional dictionary, a term does not have to appear in a dictionary (or other publication) in order for it to be found merely descriptive. *In re Thomas Collators, Inc.*, 158 USPQ 297, 298 (TTAB 1968); *see also, e.g., In re Mine Safety Appliances Co.*, 66 USPQ2d 1694, 1697 (TTAB 2002) (WORKMASK found descriptive despite absence of any evidence composite appeared in dictionaries); *In re Polo Int’l Inc.*, 51 USPQ2d 1061, 1062-63 (TTAB 1999) (finding DOC in DOC-CONTROL would refer to the “documents” managed by applicant’s software rather than the term “doctor” shown in a dictionary definition); *In re Energy Prods. of Idaho*, 13 USPQ2d 2049, 2052 (TTAB 1989) (“The absence of [WASTE-TO-ENERGY] from the dictionary is not,

¹⁷ Examining Attorney’s Brief at 11 TTABVUE 6.

contrary to applicant's argument, 'persuasive evidence' that the term is not merely descriptive of applicant's services."); *In re Digital Research Inc.*, 4 USPQ2d 1242, 1243-44 (TTAB 1987) (finding CONCURRENT PCDOS and CONCURRENT DOS merely descriptive of "computer programs recorded on disk" where the relevant trade used the denomination "concurrent" as a descriptor of a particular type of operating system); *see also Sweats Fashions Inc. v. Pannill Knitting Co., Inc.*, 833 F.2d 1560, 4 USPQ2d 1793, 1797 (Fed. Cir. 1987) (absence of term "sweats" from dictionary and fashion references was insufficient to create genuine issue of fact precluding summary judgment, "in the face of the strong evidence showing that 'sweats' is commonly used as a descriptive name for fleece garments, particularly sweatshirts and sweatpants."). Therefore, the absence of dictionary entries, except for the entry in Urban Dictionary for the term "dank," does not dictate that we find that term to be a suggestive, rather than a descriptive term. It is fundamental that a mark, or a term used in a mark, does not have to appear in a dictionary in order for it to be merely descriptive of an applicant's goods.

Applicant argues that its application should be favorably compared to that of the applicant in *Anheuser-Busch, Inc. v. Holt*, 92 USPQ2d 1101 (TTAB 2009), where the Board dismissed an opposition against the mark "BEER 1" ("beer" disclaimed)¹⁸ because "several meanings of 'one' . . . are equally plausible in the context of applicant's goods." However, unlike the record in this appeal, the record in *Anheuser*

¹⁸ This case also involved the refusal of registration of the applicant's marks ONE BEER, and



Busch v. Holt, was devoid of “credible evidence that establishes that BEER 1 would be perceived by the purchasing public as meaning ‘beer that is ranked #1’ and thus merely descriptive of beer.” 92 USPQ2d at 1106.

Here, the evidence submitted by the Examining Attorney shows that the term “dank” is commonly used by those selling or reviewing ales and beers to describe certain flavors and aromas of such products, amply supporting that “dank” when used with such goods signifies a quality, feature or characteristic of such goods, and hence is descriptive.

B. Is DANK TANK a Unitary Mark for Ale and Beer Goods?

Applicant also argues that DANK TANK is unitary and therefore should not be dissected in order to require a disclaimer of “dank.”

A mark is considered unitary when it creates a single and distinct commercial impression separate and apart from the meaning of its constituent elements. *Dena v. Belvedere*, 21 USPQ2d at 1052; *see also, In re Kraft, Inc.*, 218 USPQ 571, 573 (TTAB 1983) (the elements of a unitary mark are so integrated or merged that they cannot be regarded as separate elements, and it is obvious that no claim is made other than to the entire mark). The inquiry focuses on “how the average purchaser would encounter the mark under normal marketing of such goods and also ... what the reaction of the average purchaser would be to this display of the mark.” *Dena v. Belvedere*, 21 USPQ2d at 1052 (quoting *In re Magic Muffler Serv., Inc.*, 184 USPQ 125, 126 (TTAB 1974)).

The Court of Appeals for the Federal Circuit has set forth the characteristics of a unitary mark:

A unitary mark has certain observable characteristics. Specifically, its elements are inseparable. In a unitary mark, these observable characteristics must combine to show that the mark has a distinct meaning of its own independent of the meaning of its constituent elements. In other words, a unitary mark must create a single and distinct commercial impression.

Dena v. Belvedere, 21 USPQ2d at 1052. If the matter that comprises the mark or relevant portion of the mark is unitary, no disclaimer of an element, whether descriptive, generic, or otherwise, is required. See *In re Kraft*, 218 USPQ at 573; *In re EBS Data Processing*, 212 USPQ 964, 966 (TTAB 1981). A term such as Applicant's mark would qualify as unitary in the trademark sense only if the whole is something more than the sum of its parts. *Dena v. Belvedere*, 21 USPQ2d at 1052 (finding EUROPEAN FORMULA and design for cosmetic products not unitary because the "elements are not so merged together that they cannot be regarded as separate" and the proximity of the words to the design feature "does not endow the whole with a single, integrated, and distinct commercial impression").

In its Reply Brief, Applicant cites the non-precedential Board decision *In re Sears Brands, LLC*, Serial No. 77558337, (TTAB Dec. 20, 2010), involving an application to register the mark SEARS BLUE SERVICE CREW for retail store services in support of its position.¹⁹ We note that although parties may cite to non-precedential decisions, the Board does not encourage the practice as such decisions are not binding on the

¹⁹ Applicant's Reply Brief p. 4 (12 TTABVUE 5).

Board.²⁰ Upon considering the evidence in *Sears Brands*, the Board concluded the term “service crew” is not the usual or normal way that consumers refer to a retail department store or its employees because the term “service crew” does not immediately call to mind retail department store services or its employees. *Id.* at *8-9. Accordingly, the Board found that “Service Crew” is highly suggestive, not merely descriptive, of retail department store services. *Id.* at *9.

For purposes of completeness, in *Sears Brands*, the Board also considered whether the entire mark SEARS BLUE SERVICE CREW was a unitary mark. *Id.* at 11. Because the words in the mark were put together to function as a unit, the Board found that SEARS BLUE SERVICE CREW is a unitary mark, i.e., purchasers will not go through the mental process of parsing the mark SEARS BLUE SERVICE CREW into its component parts, but will regard it as a unitary mark.²¹ Based on the record, the Board held that the requirement for a disclaimer of the term “Service Crew” was not necessary because registration of the mark SEARS BLUE SERVICE CREW does not create or recognize any rights in the individual elements of the mark apart from the mark as a whole.

²⁰ See *In re Fiat Grp. Mktg. & Corp. Commc’ns S.p.A.*, 109 USPQ2d 1593, 1596 n.6 (TTAB 2014); *In re Luxuria s.r.o.*, 100 USPQ2d 1146, 1151 n.7 (TTAB 2011) (parties may cite to non-precedential decisions, but they are not binding on the Board and because they have no precedential effect, the Board generally will not discuss them in other decisions); see also TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE §§ 101.03 and 1203.02(f) (2020).

²¹ The Board also noted that the mark would be regarded as a unitary mark “in part, because the mark rhymes.” *In re Sears Brands*, Serial No. 77558337, at *14. In the present case, the wording in Applicant’s mark DANK TANK also rhymes, but that alone is not enough to reach the conclusion that the mark is unitary.

In this case, other than noting the “visual and rhyming presentation in that the words ‘dank’ and ‘tank’ are both four letter terms that sound alike and are readily combined,” Applicant summarily concludes that its applied-for mark is unitary and creates a distinct commercial impression separate from the terms “dank” and “tank.”²² However, in the absence of legal argument or evidence showing that its mark is unitary, we find that prospective purchasers seeing Applicant’s mark DANK TANK knowing that “dank” is descriptive of ale and beer, and “TANK” is defined as “1: a usually large receptacle for holding, transporting, or storing liquids (such as water or fuel)”²³ would readily understand it to be comprised of the two separate terms “dank” and “tank.” While the two terms in Applicant’s proposed mark rhyme, the rhyming quality imparts no new or different meaning to “DANK TANK.” *See In re Ginc UK Ltd.*, 90 USPQ2d 1472, 1477 (TTAB 2007) (finding the rhyming quality of the words ZOGGS TOGGS “does not infuse TOGGS with any separate and distinct meaning apart from its generic meaning”).

Applicant also argues that its DANK TANK mark is a double entendre.²⁴ As the Board explained in *In re The Place, Inc.*, 76 USPQ2d 1467, 1470 (TTAB 2005):

“Double entendre” is defined as “ambiguity of meaning arising from language that lends itself to more than one interpretation.” Webster’s Third New International

²² Applicant’s Brief p. 6 (9 TTABVUE 7).

²³ Definition of “tank,” Merriam-Webster Dictionary, merriam-webster.com/dictionary/tank. April 19, 2021. The Board may *sua sponte* take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including definitions in online dictionaries that exist in printed format or have regular fixed editions. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff’d*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016).

²⁴ Applicant’s Brief pp. 6-7 (9 TTABVUE 7-8).

Dictionary (1993) at p. 678. As stated in TMEP 1213.05(c), “A ‘double entendre’ is a word or expression capable of more than one interpretation. For trademark purposes, a ‘double entendre’ is an expression that has a double connotation or significance as applied to the goods or services. ... The multiple interpretations that make an expression a ‘double entendre’ must be associations that the public would make fairly readily.”

Again, Applicant summarily concludes that DANK TANK is a double entendre “because the term ‘dank’ is used by some to refer to cannabis.”²⁵ As set forth above, “DANK” is also a term used to describe the flavor and smell of ale and beer beverages; and “TANK” is “a usually large receptacle for holding, transporting, or storing liquids.”

Inasmuch as “DANK” is the leading term of Applicant’s mark, and does not create a recognizable double entendre when combined with “TANK,” it retains its descriptive significance in relation to Applicant’s ale and beer. Therefore, “DANK” would be perceived by purchasers of Applicant’s ale and beer as signifying a quality, feature or characteristic of those goods resulting in no unitary meaning or double entendre imparted by DANK TANK.

C. Any Doubts of Descriptiveness are to be Resolved in Applicant’s Favor

Lastly, in response to Applicant’s argument that any doubt as to the descriptiveness of “DANK” must be resolved in its favor, it is the Examining Attorney’s burden to make a prima facie showing that “DANK” is merely descriptive of Applicant’s goods. *In re Gyulay*, 3 USPQ2d at 1010; *In re Accelerate s.a.l.*, 101

²⁵ Applicant’s Brief p. 6 (9 TTABVUE 7).

USPQ2d 2047, 2052 (TTAB 2012). Since such a showing has been made, the burden of rebuttal shifts to Applicant. *In re Pacer Tech.*, 338 F.2d 1348, 67 USPQ2d 1629, 1632 (Fed. Cir. 2003). However, the legal arguments and minimal evidence submitted by Applicant are insufficient to overcome the evidence showing the term “DANK” to be merely descriptive of Applicant’s goods and that Applicant’s DANK TANK mark is not unitary. Therefore, while any doubt as to the mere descriptiveness of the mark is resolved in favor of Applicant, *see In re Stroh Brewery Co.*, 34 USPQ2d 1796, 1797 (TTAB 1994), here there is no doubt that “DANK” is merely descriptive of Applicant’s goods.

II. Conclusion

Accordingly, the term “DANK” used as the first word in Applicant’s mark DANK TANK retains its descriptive meaning in relation to Applicant’s goods.

Decision: The requirement for a disclaimer of “DANK” which resulted in the refusal of registration of Applicant’s mark DANK TANK, Serial No. 87772674, based on Applicant’s failure to submit such disclaimer, is affirmed.

However, in the event that Applicant submits the required disclaimer²⁶ within thirty (30) days from the date of this decision, the refusal to register application Serial No. 87772674 will be set aside, the disclaimer will be entered, and the application will proceed to publication. *See* Trademark Rule 2.142(g), 37 C.F.R. § 2.142 (g).

²⁶ The proper format for the disclaimer is: “No claim is made to the exclusive right to use DANK apart from the mark as shown.” TRADEMARK MANUAL OF EXAMINING PROCEDURE § 1213.08(a)(i) (Oct. 2018).